Filed 12/18/09 In re Leila F. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Leila F. et al., Persons Coming Under the Juvenile Court Law.	B215085 (Los Angeles County Super. Ct. No. CK53816)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.S., Defendant and Appellant; ALBERT F., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Valerie Skeba, Juvenile Court Referee. Affirmed.

Anna L. Ollinger, under appointment by the Court of Appeal, for Defendant and Appellant, S.S.

Andrea R. St. Julian, under appointment by the Court of Appeal, for Defendant and Appellant, Albert F.

Raymond G. Fortner, County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

Appellant S.S. (Mother) is the mother of four girls: Tiffani M., Harmony F., Leila F. and Cherish S.[1] Appellant Albert F. is the father of Harmony and the alleged father of Leila. This is the fourth time this matter has been before us.[2] This appeal involves only the two younger girls, Leila and Cherish.[3] Albert contends the juvenile court erred in terminating parental rights over Leila pursuant to Welfare and Institutions Code section 366.26.[4] Mother contends the court abused its discretion in denying her section 388 petition seeking to modify its prior order terminating reunification services with respect to both girls. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Underlying Facts*

The family came to the attention of the Department of Children and Family Services (DCFS) six years ago, in October 2003, when Tiffani was two and

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1 We elect to refer to the parties by their first name and last initial. (See *In re Edward S.* (2009) 173 Cal.App.4th 387, 392, fn.1.)

2 In case number B202788, Mother and Albert appealed the juvenile court's jurisdictional and dispositional orders. In case number B209106, Mother and Albert appealed the court's order terminating parental rights over Harmony and Albert appealed an order denying a section 388 petition filed in June 2008. In case number B213309, Mother appealed the order denying a section 388 petition filed in October 2008.

3 The identity of Cherish's father has never been ascertained.

4 Statutory references are to the Welfare and Institutions Code.

Harmony was an infant (prior to the births of Leila and Cherish). In 2004, the court sustained a jurisdictional petition alleging that Mother had excessively disciplined Tiffani, that Tiffani had been exposed to a violent altercation between Jose M. (Tiffani's father) and Albert, and that Albert had an unresolved history of domestic violence. In early 2004, Albert, who had been given custody of Harmony, left her with his mother and ceased communication with DCFS. He completed no part of his reunification program, which included parent education, anger management classes and individual counseling. DCFS filed a supplemental petition alleging that Albert had abandoned Harmony without support and failed to inform DCFS of his whereabouts.[5] In the meantime, Mother underwent counseling and completed an anger management program and in May 2005, regained custody of Tiffani and Harmony.

In March 2006, before jurisdiction was formally terminated, Tiffani's father Jose informed the caseworker that Tiffani reported having been touched inappropriately by Albert. Tiffani subsequently told the caseworker that she had been digitally penetrated by Albert "a lot of times" and that Albert had also inappropriately touched Harmony and Leila.[6] DCFS filed a supplemental petition seeking to remove Tiffani and Harmony from Mother's custody and new petitions seeking jurisdiction over Leila and Cherish.[7] The petitions alleged sexual abuse

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[5] DCFS received conflicting information concerning Albert's status and location. Albert said he left the state for employment purposes. Other witnesses (including family members) said he never left the area and was still associating with Mother. Jose and his wife reported seeing Albert with Mother on various occasions when she picked up and dropped off Tiffani.

[6] In July 2007, Albert was arrested for molesting Tiffani. In 2008, he pled guilty to child endangerment.

[7] As explained in *In re Barbara P.* (1994) 30 Cal.App.4th 926, 933, a supplemental petition is filed "when a dependent child has been placed with a parent, but the

and failure to protect. The four girls were detained.[8] Tiffani was placed in the custody of Jose and his wife; Harmony and Leila were placed together in a single foster home; after Cherish's birth in late 2006, she was placed with Harmony and Leila.

B. *Jurisdictional/Dispositional Hearings*

At the contested jurisdictional hearing, after listening to Tiffani's testimony, the court sustained the petitions, finding that Albert had sexually abused Tiffani and that he had also inappropriately touched Harmony and Leila. The court further found that Mother had failed to take action to protect the children. At the September 2007 dispositional hearing, the court ordered six months of reunification services for Mother with respect to Leila and Cherish, viz., a DCFS approved program of drug rehabilitation with random testing and individual counseling to address sexual abuse.[9] The court denied Albert reunification services with respect to Leila because he was the alleged father only.[10] At the close of the

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department now seeks to remove the child, effectively requesting the court to modify its previous placement order."

[8] At the detention hearing, the court ordered DCFS to provide reunification services, including drug testing, drug counseling and sexual abuse counseling for non-offenders for Mother, and sexual abuse and anger management counseling for Albert.

[9] The court denied Mother reunification services with respect to Tiffani and Harmony because DCFS had already provided more than 18 months of services.

[10] The court denied Albert reunification services with respect to Harmony under section 361.5, subdivision (a), finding that he had been given 12 months of services earlier and that there was no basis to believe an additional six months of effort would result in the child being released to his custody. As we discussed in the opinion in case number B202788 in which we affirmed the order, the court's ruling denying Albert reunification services was appropriate on the grounds stated and was also proper under section 361.5, subdivision (b)(6), which applies where a child has been adjudicated a dependent as a result of "severe sexual abuse . . . to the child, a sibling, or a half[-

dispositional hearing, the court set the six-month review hearing and advised Mother that the purpose of that hearing would be to determine the permanent plan for Leila and Cherish. The court warned Mother: "[I]f you fail in your performance during [the following six months], you can expect that these children are going to be moving into the adoption mode, and you will lose them."

C. *Reunification Period*

In October 2007, the caseworker gave Mother a list of referrals for programs to address drug rehabilitation and the telephone number for the Child Sexual Abuse Program (CSAP). The caseworker instructed Mother to begin drug testing with Pacific Toxicology. By November 2007, Mother was attending Narcotics Anonymous (NA) meetings and was enrolled in a drug rehabilitation program, but not in CSAP. Mother stated that CSAP conflicted with the drug rehabilitation program, and also said that she had been advised by her attorney not to participate in CSAP because she was not the offender. Mother further reported that sexual abuse counseling was being addressed in her drug counseling program.[11] Mother missed several drug tests.[12]

The March 2008 report prepared for the six-month review hearing stated that Mother claimed to have graduated from the drug rehabilitation program, was visiting the children two or three times monthly and was attending NA meetings.

]sibling" and "the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent . . . ."

[11] The caseworker corrected Mother's misimpression concerning CSAP, informing her that it did provide counseling for non-offending parents and "impressed on [her] the need for her to comply with court orders and [the] DCFS case plan."

[12] Pacific Toxicology reported a single completed test on October 23. The results were negative.

The caseworker questioned whether Mother had "grasped the severity" of the sexual abuse allegations because she had not participated in individual counseling to address sexual abuse. In addition, the caseworker reported hearing from a detective involved in Albert's criminal case that Tiffani had changed her story at a hearing and later said that Mother had told her to lie to protect Albert. The caseworker recommended termination of reunification services because Mother had failed to drug test or to obtain individual counseling to address sexual abuse issues and because "the risk level for abuse and failure to protect remains high for Leila and Cherish."

By May 2008, prior to the continued six-month review hearing, Mother had completed the drug rehabilitation program except for attending nine support meetings and finding a sponsor. Mother was being randomly drug-tested at the rehabilitation facility, which reported multiple negative tests and two diluted tests. The caseworker continued to recommend termination of reunification services because Mother had failed to address the sexual abuse issue with appropriate counseling. The caseworker also expressed concern about Mother's ongoing relationship with Albert, after being informed that Mother had visited him in prison and had encouraged Tiffani to change her story to protect him.

On May 15, 2008, Albert was released from prison. On June 4, he had a monitored visit with Harmony and Leila. This was the first time the children had seen him since their detention. The children played with Albert, but appeared uncomfortable and bored at times, and asked to go with their "mommy," the foster mother.

In June 2008, Mother filed a section 388 petition. Attached to the petition were two letters from Alyce Bell, Mother's certified counselor for the drug rehabilitation program. The letters stated that Mother had successfully completed the drug rehabilitation program and that Mother had addressed Tiffani's sexual

abuse during individual counseling sessions and parenting classes. The court summarily denied the petition.

At the June 26, 2008 contested six-month review hearing, the court terminated Mother's reunification services. In making its ruling, the court stated that the sexual abuse counseling from Bell was insufficient to meet that component of the case plan because Bell was not a licensed therapist or trainee in the field.

D. *Post-Reunification Period*

In October 2008, Mother filed a new section 388 petition seeking return of Harmony, Leila and Cherish to her care or, in the alternative, liberalized visitation and additional reunification services. The court scheduled a hearing on the petition based on Mother's representations that she had completed the drug rehabilitation program, had begun a 12-step program and was "two-thirds of the way through CSAP." The caseworker subsequently contacted Mother's drug rehabilitation program and was unable to confirm Mother's assertions of participation in a 12-step program. In addition, the coordinator of CSAP reported that Mother had attended a single session on October 6, 2008 and was dropped from the program for failing to attend subsequent sessions. At the December 17 hearing on the petition, the court stated that because it appeared Mother had not addressed the sexual abuse issue, the court could not find a substantial change in circumstances that would justify granting further family reunification services.[13]

[13] Mother appealed the denial of this section 388 petition in case no. B213309. By opinion dated December 2, 2009, we affirmed.

E. *Visitation*

In its December 17, 2008 report, the caseworker stated that Mother had visited the girls on November 6, 8, 15 and 22, and on December 6. She missed a visit on December 13. During some visits, Mother and the children sang and played together and Mother took pictures. On other visits, they played at a park and at Chuck E. Cheese's. Mother combed Tiffani's hair and brought shoes for Leila and Harmony. Mother brought chips to one early morning visit, which the foster mother believed was inappropriate.

Albert and his mother visited Harmony and Leila on August 14, 2008. He brought toys and they appeared to enjoy playing with him. Reminded that he was entitled to three-hour visits, Albert informed the caseworker that he preferred to limit visitation to one hour.

In February and March 2009, the caseworker reported that Mother had visited the children on December 28, 2008 and January 22, February 1, February 26 and March 19, 2009. One scheduled visit was called off because Leila and Cherish were not feeling well. Another was called off because Mother's godmother was in the hospital. Nine other potential visiting days passed without visits because Mother did not call in advance to make arrangements. When visits occurred, the children seemed happy to see Mother. During the visits, they played or ate or Mother helped the older girls with homework. At one visit, Mother tried to sneak a cell phone to Tiffani, but Tiffani later told the caseworker about it.

Albert visited the children once during this period, on January 4, 2009. Albert brought gifts -- toys and clothing. Mother arrived while the visit was occurring, expressing the desire to visit the children in Albert's company.

F. *Adoptability*

The girls' foster mother expressed interest in adoption at an early stage of the proceedings and has been identified as the prospective adoptive mother for Harmony. The caseworker reported that "[a]ll of [the girls'] physical, developmental, emotional and mental health needs have been taken care of since they came in to [the foster mother's] home" and that they were thriving in her care. The home study was approved in October 2008.

G. *Mother's March 2009 Section 388 Petition*

On March 25, 2009, Mother filed a new section 388 petition seeking reinstatement of reunification services and unmonitored visits. The petition stated she had continued attending NA meetings and was participating in CSAP counseling. Mother provided a copy of her NA attendance sheet showing attendance at 26 meetings between December 2008 and March 2009. CSAP confirmed Mother had attended six sessions beginning in January.[14] In an attached letter to the court, Mother stated that she had not felt comfortable in CSAP counseling sessions at first because the sessions reminded her of unresolved sexual abuse issues from her own past. Mother stated that the sessions had given her a new outlook and clearer understanding of what had happened, as well as a greater ability to protect her children in the future.

The court denied the petition summarily. At the March 26, 2009 section 366.26 hearing, the court stated that the petition showed "changing circumstances" not "a change to circumstances" or that it would be in the best interests of the children to grant the petition.

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[14] The counselor could not give more information because CSAP's policy required six months of treatment before issuance of a progress report.

H. *Section 366.26 Hearing*

At the March 26, 2009 hearing to resolve termination of parental rights over Leila and Cherish, the children's attorney stated that there was "definitely affection" between the girls and Mother and Albert, noting that the girls ran to them and "gave them big hugs" when they arrived at court. She contended, however, that the affection did not rise to the level necessary to avoid termination of parental rights. The court agreed with counsel that the exception applicable where the parent maintains regular visitation and contact with the child and the child would benefit from continuing the relationship had not been met:[15] "[T]he parents are saying they want to be part of their children's lives . . . [a]nd the reality is . . . they haven't had much contact with the kids in the last few months, when they knew it was going to be an issue. . . . [T]his is a case where there might have been a (c)(1)(A) exception. But the reality is . . . that they haven't had frequent and regular visitation and contact, and they haven't acted in a parental role. . . . I cannot overlook my obligation [under] the law . . . regardless of . . . how the children seem to be very bonded to their parents. Nobody is denying that. But this is not a (c)(1)(A) exception. They haven't acted in a parental role." The court terminated parental rights over Leila and Cherish. This appeal followed.

DISCUSSION

A. *Mother's Appeal*

Section 388 provides in pertinent part: "(a) Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court

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[15] This exception was formerly found in section 366.26, subdivision (c)(1)(A). Currently it is found in section 366.26, subdivision (c)(1)(B)(i).

. . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court . . . . [¶] (d) If it appears that the best interests of the child may be promoted by the proposed change of order . . . [or] termination of jurisdiction . . . , the court shall order that a hearing be held . . . ." Mother contends the court abused its discretion in denying her March 2009 section 388 petition without affording a hearing. We disagree.

To be entitled to a hearing, the parent must make "a prima facie showing" of "facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited. [Citation.]" (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 310; Cal. Rules of Court, rule 5.570(e).) The juvenile court should liberally construe the petition in favor of its sufficiency, and grant a hearing if the petition presents any evidence that a hearing would promote the best interests of the child. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) If, on the other hand, "the petition fails to state a change of circumstances or new evidence that might require a change of order, the court may deny the application ex parte. [Citation.]" (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450; see Cal. Rules of Court, rule 5.570(d).) "The conditional language of section 388 makes clear that the hearing is only to be held if it appears that the best interests of the child may be promoted by the proposed change of order, which necessarily contemplates that a court need not order a hearing if this element is absent from the showing made by the petition. [Citation.]" (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806-807, fn. omitted.) In deciding whether to hold a hearing or summarily deny a section 388 petition, the court is entitled to rely on its knowledge of the facts of the case gleaned from prior hearings and the regular reports prepared by DCFS caseworkers. (See *In re Jamika W., supra,* 54 Cal.App.4th at pp. 1450-1451.) Whether to grant the petition "is addressed to the sound discretion of the juvenile court and its decision will not

be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 415.)

There was no abuse of discretion here. The record established that DCFS had been providing services to Mother in an attempt to improve her parenting skills for nearly six years. With respect to Leila and Cherish, the court made services available, including sexual abuse counseling, from the time of the detention hearing in 2006. Mother had more than two years to complete sexual abuse counseling. Only in October 2008, months after reunification services had been terminated, did Mother begin CSAP counseling, and gave up after a single session. Finally, on the eve of the section 366.26 hearing, she claimed to have begun the difficult process of addressing the emotional problems that caused her to continue to associate with and defend her daughters' abuser. In the meantime, Leila and Cherish had spent more than three years in the home of their foster mother and had come to regard her as their true mother. The foster mother had provided them exceptional care and was ready to adopt and raise them in a stable and loving home with their sister, Harmony. The court was entitled to take all these factors into account in determining that Mother, having presented evidence of modest progress in addressing the sexual abuse issue, failed to present a prima facie case that prolonging this matter further in order to afford her one more opportunity to become an acceptable parent was in the best interests of Leila and Cherish. As our Supreme Court has observed: "Childhood does not wait for the parent to become adequate." (*In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 309-310.) "'The parent's interest in having an opportunity to reunify with the child is balanced against the child's need for a stable, permanent home. The parent is given a reasonable period of time to reunify and, if unsuccessful, the child's interest in permanency and stability takes priority.'" (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1015-1016.)

B. *Albert's Appeal*

Albert contends the court erred in terminating parental rights over Leila despite evidence of "the obvious closeness that Albert shared with his daughter." Respondent contends Albert lacks standing to appeal because he is only the alleged father of Leila. Respondent is correct.[16]

"The extent to which a father may participate in dependency proceedings and his rights in those proceedings are dependent on his paternal status." (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760, italics omitted.) "An alleged father does not have a current interest in a child because his paternity has not yet been established." (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1406.) "[I]t is generally said that an alleged father's rights are limited to 'an opportunity to appear and assert a position and attempt to change his paternity status . . . .'" (*In re J.O.* (2009) 178 Cal.App.4th 139, 147, quoting *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.) Thus, an alleged father who fails to become a party of record in the dependency proceedings by transforming his status to that of a presumed father has no standing to appeal an order terminating parental rights over a minor. (*In re*

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[16] In his reply brief, Albert notes that he participated in the proceedings below and that this is his third appeal in the matter. The proceedings below and the prior appeals raised issues relating to Harmony. No one disputes that Albert, as the presumed father of Harmony, had the right to participate in proceedings involving her.

Moreover, in Albert's first appeal (case number B202788), which involved Harmony and Leila, Albert contended not that he should be afforded the rights of a presumed father with respect to Leila, but that as a biological father he should have been provided reunification services. Albert raises a similar argument here with respect to challenging termination of parental rights over Leila, appearing to believe that he achieved the status of biological father. As we stated in the opinion in case no. B202788, the court made no finding of paternity and the evidence did not indisputably support it: Albert was not listed on the birth certificate, there was no evidence of a paternity test (or a request for a paternity test), and although Mother identified him as Leila's biological father, Albert told the caseworker he was "not sure." Albert has done nothing since then to advance his claim to biological paternity.

Joseph G. (2000) 83 Cal.App.4th 712, 716; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596; see also *In re Christopher M.* (2003) 113 Cal.App.4th 155, 160 [alleged father not entitled to contest section 366.26 determination in juvenile court].)[17]

Moreover, even were we to consider the merits, we would affirm the juvenile court's order terminating parental rights. Section 366.26 requires the court to choose between three alternatives -- adoption, guardianship or long-term foster care. (§ 366.26, subd. (b).) If a child is adoptable, there is a strong preference for termination of parental rights and adoption over the other alternatives. (*San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888.) There is no dispute that Leila is adoptable and will almost certainly be adopted by her current foster mother.

Once it becomes clear that a child is likely to be adopted, the burden shifts to the parent to demonstrate that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.) Subdivision (c)(1)(B)(i) provides an exception to termination of parental rights where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." "[T]o establish the exception in [former] section 366.26, subdivision (c)(1)(A), the parents must do more than demonstrate 'frequent and loving contact' [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.] Rather, the

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[17] Albert contends that termination of parental rights in accordance with dependency statute dictates violates his fundamental right to parent his child and serves no compelling state interest. As the Supreme Court stated in *In re Marilyn H.*, *supra*, 5 Cal.4th at page 307: "[The state's] . . . interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful . . . is a compelling one."

parents must show that they occupy 'a parental role' in the child's life." (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109, quoting *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) The court should also consider such factors as the age of the child and the portion of the child's life spent out of the parent's custody. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575-576.) To support a finding of "benefit" under section 366.26, subdivision (c)(1)(B)(i), the parent-child relationship must "promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H., supra,* at p. 575.)

The record indicates that Leila was a year old when she was detained, and that Albert had visited her only a handful of times in the three years following her detention. Each of the visits was monitored and brief. He declined an offer of more extensive visitation.[18] That Leila seemed happy to see him and was affectionate toward him is not evidence of a bond that outweighs the benefit she will receive from finally obtaining a permanent home with an adult who has demonstrated the desire and capacity to care for her every day.

DISPOSITION

The court's orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.

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[18] Although the court found that Albert was an alleged father only, he was afforded visitation with Leila.